Re Tan Eng Niang; ex p Ng Choo Kwan & Sons Hardware Sdn Bhd

HIGH COURT (MELAKA) — BANKRUPTCY NO 29–1158 OF 2000
LOW HOP BING J
31 JULY 2003

Bankruptcy *— Adjournment — Application for — Discretion of court — Special rules in bankruptcy proceedings — Whether there is sufficient cause or reasonable ground to grant an adjournment — Bankruptcy Rules 1969 r 127*

This was an appeal by the judgment debtor ('JD') against the order of the learned registrar who refused to grant an adjournment of the hearing of the judgment creditor's ('JC') petition against the JD. On 22 August 2002, the JC's petition against the JD was to be heard. On 19 August 2002, ie, three days before the hearing, the JD's solicitor wrote a letter to the learned registrar asking for an adjournment of the said hearing. That application for adjournment was granted by the learned registrar who re-fixed the hearing for 21 November 2002. On 19 November 2002, the JD filed an application to set aside the judgment in default obtained by the JC against him. On the same day, ie, two days before the hearing of the creditor's petition, the JD's solicitor wrote to the learned registrar asking for a second adjournment which was refused.

Held, dismissing the appeal:

(1) Despite the strict requirement of r 127 of the Bankruptcy Rules 1969, if the JD is able to show sufficient cause or reasonable ground, there is still a discretion conferred upon the court to exercise on whether to grant or refuse an adjournment. The facts in the instant appeal revealed that when the first adjournment was granted by the learned registrar on 22 August 2002 and re-fixed to 21 November 2002, no step was ever taken by the JD to apply to set aside the default judgment until 19 November 2002, ie two days before the adjourned hearing. This is far from being a sufficient cause or reasonable ground to be considered in exercising the discretion to grant an adjournment under r 127 (see p 679F).

(2) In the exercise of the court's jurisdiction in bankruptcy proceedings such as the instant appeal, the court cannot go behind the judgment and inquire into the validity of the debt the judgment (see p 684E); *Sovereign General Insurance Sdn Bhd v Koh Tian Bee* [1988] 1 MLJ 304; *Malayan Banking Bhd v Datuk Lim Kheng Khim* [1992] 2 MLJ 540; *Re Tan Hwee Earn; ex p The People's Insurance Co (M) Sdn Bhd* [1999] 4 MLJ 248 followed. A judgment, be it a judgment in default, summary judgment or a judgment obtained after a full hearing, is nonetheless a good, enforceable and valid judgment unless and until it is set aside, or execution thereof has been stayed: *Pembinaan KSY Sdn Bhd v*

Lian Seng Properties Sdn Bhd [1991] MLJ 100 followed. Since the JD is bound by the judgment in default which has not been stayed, the JC is entitled to proceed with the creditor's petition in the same way as a judgment debtor company may be wound up based on the default judgment (see p 684G–H).

[Bahasa Malaysia summary

Ini merupakan satu rayuan daripada penghutang penghakiman ('PHP') menentang perintah pendaftar yang menolak permohonan penangguhan perbicaraan petisyen pemiutang penghakiman ('PMP') menentang PHP. Pada 22 Ogos 2002, petisyen PMP menentang PHP sepatutnya dibicarakan. Pada 19 Ogos 2002, iaitu tiga hari sebelum perbicaraan tersebut, peguam PHP menulis surat kepada pendaftar tersebut memohon penangguhan perbicaraan tersebut. Permohonan penangguhan tersebut telah dibenarkan oleh pendaftar, yang mengubah tarikh perbicaraan kepada 21 November 2002. Pada 19 November 2002, PHP memfailkan satu permohonan untuk mengenepikan penghakiman mungkir yang diperoleh oleh PMP terhadap PHP. Pada hari yang sama juga, iaitu dua hari sebelum perbicaraan petisyen pemiutang, peguam PHP menulis kepada pendaftar memohon penangguhan yang kedua. Permohonan tersebut ditolak.

Diputuskan, membuang rayuan tersebut:

(1) Meskipun k 127 Kaedah-kaedah Kebankrapan 1969 mempunyai keperluan yang ketat, sekiranya PHP dapat menunjukkan kausa yang mencukupi atau alasan yang munasabah, masih terdapat budi bicara yang dapat digunakan oleh mahkamah samada untuk membenarkan atau menolak suatu penangguhan. Fakta-fakta dalam rayuan ini menunjukkan bahawa apabila penangguhan pertama dibenarkan oleh pendaftar pada 22 Ogos 2002 dan ditunda ke 21 November 2002, tiada langkah diambil oleh PHP untuk memohon mengenepikan penghakiman mungkir sehingga 19 November 2002, iaitu dua hari sebelum perbicaraan yang ditangguhkan itu. Ini jauh dari membentuk kausa yang mencukupi atau alasan yang munasabah untuk dipertimbangkan dalam menggunakan budi bicara mahkamah untuk membenarkan satu penangguhan di bawah k 127 (lihat ms 679F).

(2) Dalam menggunakan bidangkuasa mahkamah dalam prosiding-prosiding kebankrapan seperti dalam rayuan ini, mahkamah tidak boleh memeriksa penghakiman tersebut dan mempersoalkan keesahan hutang penghakiman tersebut (lihat ms 684E); *Sovereign General Insurance Sdn Bhd v Koh Tian Bee* [1988] 1 MLJ 304; *Malayan Banking Bhd v Datuk Lim Kheng Khim* [1992] 2 MLJ 540; *Re Tan Hwee Earn; ex p The People's Insurance Co (M) Sdn Bhd* [1999] 4 MLJ 248 diikut. Suatu penghakiman, samada penghakiman mungkir, penghakiman terus atau penghakiman

yang diperoleh selepas perbicaraan penuh, adalah satu penghakiman yang baik, boleh dikuatkuasakan dan sah sehinggalah ia diketepikan, atau perlaksanaannya digantung; *Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd* [1991] MLJ 100 diikut. Oleh kerana PHP diikat oleh penghakiman mungkir tersebut yang belum digantung, PMP berhak meneruskan prosiding dengan petisyen pemiutang dalam cara yang sama suatu syarikat penghutang penghakiman boleh diggulung berdasarkan penghakiman mungkir tersebut (lihat ms 684G–H).

Notes

For cases on application for adjournment, see 1 *Mallal's Digest* (4th Ed, 2001 Reissue) para 2002.

Cases referred to

Bank Pembangunan (M) Bhd v Elgi Marka Sdn Bhd [1998] 5 MLJ 504 (refd)

Dato' Mohamed Pilus bin Yusof, Re; Ex parte Southern Bank Bhd [1988] 1 MLJ 536 [1988] 1 MLJ 536 (refd)

Datuk Lim Kheng Kim v Malayan Banking Bhd [1993] 2 MLJ 298 (refd)

Malayan Banking Bhd v Datuk Lim Kheng Khim [1992]2 MLJ 540 (folld)

Mat Sari bin Hamid, Re; Ex Parte United Asian Bank Bhd [1993] 1 CLJ 202 (refd)

Natseven TV Sdn Bhd v Television New Zealand Ltd [2001] MLJU 511, [2001] 4 CLJ 722 (refd)

OCBC Bank (M) Bhd v Sethu a/l Ambalagara Thevar [1998] 3 MLJ 769 (folld)

Pembinaan KSY Sdn Bhd v Lian Seng Properties Sdn Bhd [1991] MLJ 100 (refd)

RHB Bank Bhd v Pembinaan MCP Sdn Bhd [2002] MLJU 597, [2003] 5 CLJ 335 (refd)

Sovereign General Insurance Sdn Bhd v Koh Tian Bee [1988] 1 MLJ 304 (folld)

Sungei Rinching Sdn Bhd v Sri Keluarga Sdn Bhd [1996] 2 MLJ 199 (refd)

Tan Hwee Earn, Re; ex p The People's Insurance Co (M) Sdn Bhd [1999] 4 MLJ 248 (folld)

YPJE Consultancy Service Sdn Bhd v Heller Factoring (M) Sdn Bhd (Formerly Known as Matang Factoring Sdn [1996] 2 MLJ 482

Legislation referred to

Bankruptcy Rules 1969 rr 117, 127

Shaar Nori (*Shaari Nor & Co*) for the judgment debtor.
Rajpal Singh (*A Zahari & Rakan-Rakan*) for the judgment creditor.

Low Hop Bing J:

APPEAL

This is an appeal by the judgment debtor ('JD') against the order of the learned registrar who refused to grant an adjournment of the hearing of the judgment creditor's ('JC')petition against the JD on 21 November 2002.

FACTUAL BACKGROUND

On 22 August 2002, the JC's petition against the JD was to be heard.

On 19 August 2002, ie three days before the hearing, the JD's solicitor wrote a letter to the learned registrar asking for an adjournment of the said hearing.

That application for adjournment was granted by the learned registrar who refixed the hearing for 21 November 2002.

On 19 November 2002, the JD filed an application in the Kuala Lumpur High Court to set aside the judgment in default obtained by the JC against him. On the same day, ie two days before the hearing of the creditor's petition, JD's learned counsel wrote to the learned registrar asking for a second adjournment which was refused.

The petition was heard by the learned registrar who made a receiving order and adjudication order against the JD.

SUBMISSION FOR JD

Encik Shaari Nor, learned counsel for the JD, submitted that the learned registrar has wrongly exercised his discretion when he refused the second adjournment which has caused hardship to the JD who has now been adjudged a bankrupt and has been unable to work.

CONTENTION FOR JC

Respondent JC's learned counsel, Mr Rajpal Singh contended that this court in exercising jurisdiction in bankruptcy matters would not be concerned with the judgment that has been obtained against the JD. He added that there has been no stay of that judgment, and that the power to grant adjournment involves an exercise of discretion, on the basis of a prior notice by the JD that he intends to show cause under r 127 of the Bankruptcy Rules 1969.

DECISION ON APPEAL

Adjournments

The matter before me concerns a bankruptcy matter and so the governing procedural law is to be found primarily in the Bankruptcy Rules 1969. For the purposes of obtaining an adjournment of hearing of a petition, it is essential for the JD to take heed of r 127 which reads:

127 Adjournments of hearing

> After the expiration of one month from the day appointed for the first hearing of a petition (provided such petition shall have been duly served) no further adjournment of the hearing merely by consent of the parties shall be allowed uness the debtor has given prior notice that he intends to show cause against the petition; but in every such case unless an order for adjournment is made the Court shall either make a receiving order or dismiss the petitition.

As the petition has been fixed for hearing on 22 August 2002 and then adjourned to 21 November 2002, there has been a lapse of some three months from the day appointed for the hearing of the petition, and so no further adjournment shall be allowed under r 127 unless the JD has given prior notice that he intends to show cause against the petition.

The procedure for the JD intending to show cause against a petition is to be found in r 117 which merits reproduction as follows:

> 117 Debtor intending to show cause
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> Where a debtor intends to show cause against a petition he shall file a notice with the Registrar specifying the statements in the petition which he intends to deny or dispute and transmit by post or otherwise to the petitioning creditor and his solicitor if known a copy of the notice three days befoe the day on which the petition is to be heard.

Under r 117, the JD has to file Form 16 of the Appendix to the Bankruptcy Rules 1969: *Datuk Lim Kheng Kim v Malayan Banking Bhd* [1993] 2 MLJ 298 (SC).

I am unable to find any submission for the JD that the requirement under r 127 read with r 117 has been fulfilled by the JD. A proper perusal of all the cause papers in the entire file herein reveals that the JD has failed to do so.

Be that as it may, I am of the view that despite the strict requirement of r 127, if the JD is able to show sufficient cause or reasonable ground, there is still a discretion conferred upon the court to exercise i.e. whether to grant or refuse an adjournment.

Rule 127 came up for judicial consideration by Peh Swee Chin J (later FCJ) in *Re Dato' Mohamed Pilus bin Yusof, Ex Parte Southern Bank Bhd* [1988] 1 MLJ 536 in which the learned Judge refused an adjournment of the hearing of a creditor's petition which came up for hearing for the fourth time, even though his Lordship observed that a bankruptcy court has a discretion, or even a residual one, to temper the stringency of r 127 which does not impose an absolute prohibition of adjournment just because of the absence of a prior notice of intention to show cause, so long as there is sufficient cause or reasonable ground to grant a postponement, eg a genuine offer to settle the amount claimed, but the possibility or probability that the debtor would settle the sum due, as he had secured a contract worth RM2m, was held to be no sufficient cause or reasonable ground to grant an adjournment.

In *Re Mat Sari bin Hamid; Ex Parte United Asian Bank Bhd* [1993] 1 CLJ 202, the debtor at the eleventh hour applied under r 127 for an

adjournment of the hearing of a creditor's petition on the ground that an application has been made to set aside the judgment in default which had been obtained and on which the bankruptcy proceedings had been founded, so that the application to set aside the judgment may be heard first. Selventhiranathan J dismissed the application as it was an attempt to stave off the making of the receiving and adjudication orders and so bereft of bona fides.

The facts in the instant appeal revealed that when the first adjournment was granted by the learned registrar on 22 August 2002 and re-fixed to 21 November 2002, no step was ever taken by the JD to apply to set aside the default judgment in Kuala Lumpur until 19 November 2002, ie two days before the adjourned hearing. In my view, this is far from being a sufficient cause or reasonable ground to be considered in exercising the discretion to grant an adjournment under r 127.

The Court of Appeal in *OCBC Bank (M) Bhd v Sethu a/l Ambalagara Thevar* [1998] 3 MLJ 769 held that the courts below shall take note of r!27 which should be adhered to strictly and an adjournment of not exceeding one month be allowed only once, and that if a judgment debtor is unable to pay the amount stated in the bankruptcy notice, he should be made a bankrupt without further ado.

Judgment in default

It is pertinent to note that in the exercise of my jurisdiction in bankruptcy proceedings such as the instant appeal, I cannot go behind the judgment and inquire into the validity of the debt the judgment: *Sovereign General Insurance Sdn Bhd v Koh Tian Bee* [1988] 1 MLJ 304 (SC); *Malayan Banking Bhd v Datuk Lim Kheng Khim* [1992] 2 MLJ 540 (HC) upheld by the then Supreme Court in *Datuk Lim Kheng Kim*; *Re Tan Hwee Earn; ex p The People's Insurance Co (M) Sdn Bhd* [1999] 4 MLJ 248 (HC).

There is high authority to support the principle that a judgment, be it a judgment in default, summary judgment or a judgment obtained after a full hearing, is nonetheless a good, enforceable and valid judgment unless and until it is set aside, or execution thereof has been stayed: *Pembinaan KSY Sdn Bhd v. Lian Seng Properties Sdn Bhd* [1991] MLJ 100 (SC) (see also *RHB Bank Bhd v Pembinaan MCP Sdn Bhd* [2002] MLJU 597, [2003] 5 CLJ 335 (HC); and *Natseven TV Sdn Bhd v Television New Zealand Ltd* [2001] MLJU 511,[2001] 4 CLJ 722).

Since the JD is bound by the judgment in default which has not been stayed, the JC is entitled to proceed with the creditor's petition in the same way as a judgment debtor company may be wound up based on the default judgment (see *YPJE Consultancy Service Sdn Bhd v Heller Factoring (M) Sdn Bhd (Formerly Known as Matang Factoring Sdn Bhd)* [1996] 2 MLJ 482 (CA); *Bank Pembangunan (M) Bhd v Elgi Marka Sdn Bhd* [1998] 5 MLJ 504; *Sungei Rinching Sdn Bhd v Sri Keluarga Sdn Bhd* [1996] 2 MLJ 199 (CA) and *Natseven TV Sdn Bhd.*

A CONCLUSION

The appeal is devoid of merits. The learned registrar has exercised his discretion correctly and properly under r 127. I therefore affirm the registrar's decision and dismiss this appeal with costs.

B Reported by Peter Ling

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